Shareholder Remedies

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TRANSCRIPT

Hello. I'm Chris Riley, and I'm the module convenor for Company law. In this video blog, we're going to look at an area of company law that many students seem to have some difficulty with, which is the topic of shareholder remedies.

If a shareholder feels unhappy about the way the company's directors or how fellow shareholders are behaving, she has a number of different remedies available to her. Sorting out and understanding the differences between these different actions that a shareholder can take, can be a challenge to any student. Applying the different remedies to the different factual circumstances of say, a problem question and working out which remedy is most relevant on the particular facts can be even more difficult for students.

To make sense of this area, it's worth bearing in mind that there are essentially three different remedies that a shareholder may bring. We look at them in turn and just try and pick out the essential differences between them. The first remedy that a shareholder might bring is to bring a claim on behalf of the company, a so-called derivative claim. The rules for the derivative claim are now found in Part 11 of the Companies Act. This form of remedy for shareholder is really limited to a specific complaint that a shareholder may have, namely that the company's directors have breached the duties which they owe to that company. If a shareholder has other complaints about what's going on inside the company by the way the directors or the shareholders are behaving that do not amount to an alleged breach of duty by directors, then it's not easy for the shareholder to bring that complaint as a derivative claim.

The most important issue in regards to derivative claims now seems to be the question of whether or not the shareholder who started a derivative claim will be given permission to continue with that claim all the way to a trial against the director. The criteria that the judge must apply in deciding whether or not to give such permission are found in Section 263 of the Companies Act. It's important if you have a problem question on this area that asks you to look at the likelihood of permission being given to show that you have a good understanding of those criteria in section 263 that you can apply them methodically to the facts of the question and also that you have some knowledge of the case law that's being built up to interpret those statutory criteria.

The second remedy that a shareholder might bring arises from an action to enforce the rules that are found in the company's own constitution. That action is a personal action and it can be brought by any shareholder individually under section 33 of the Companies Act. Like the derivative claim, this remedy is also limited in scope. To take advantage of this remedy, the shareholder has to be able to point to some breach of the rules in the

company's own constitution. If the shareholder's complaints are about things that do not amount to a breach of the constitution, then she'll have to look into one of the other remedies as a basis for her complaint.

Even if the facts of the question do point to a breach of the company's own constitution, is also important if you're doing a question on this area to bear in mind that not all breach of the articles will give rise to a successful action under section 33. Most forms of questions will be testing whether you can recognize those other situations in which there does appear to be a breach of the constitution but not one which the courts are likely to see enforced under section 33. For example, we know that when a breach of the articles does not affect the membership rights of the shareholder, does not affect the shareholder in their capacity as a shareholder and the course, maybe you're willing to allow that sort of complaint to be brought under section 33. Similarly, if the courts characterize the breach of the articles as being a mere internal irregularity, then in those situations, again, the court is unlikely to allow enforcement under section 33.

The third shareholder remedy which I'll mention concerns proceedings to enforce the statutory provisions which are found either in section 994 of the Companies Act. That's the so-called 'unfair prejudice' provision or the provision of section 122(1)(g) of the Insolvency Act 1986, that is the winding up of the company on the just and equitable ground. Evident here that, in fact, there are separate provisions and therefore in a sense two separate remedies, but they are so similar in their scope and in the result that they lead to normally a buyout of the minority shareholder's shares that is convenient to group them together in your mind as a single remedy. For both these statutory provisions, their scope is much wider than the other two remedies we've looked at so far. Under both of these statutory provisions, it would certainly be possible to argue that there had been a breach of the director's duties or breach of the company's constitution, but also possible to complain about much more besides those two things. Exactly how much a shareholder can complain about under section 994 or section 122 of the winding-up provision is not made clear in the statutory provisions themselves, but it does now seem reasonably well-settled by the case law that a shareholder can complain about either a breach of her strict legal rights or at least if a company is a quasi partnership, she can complain about breaches of shared, but possibly very informal understandings between the shareholders about how the company will be run and how the shareholders will treat each other.

Of course, these shared but informal understandings between the shareholders within so-called quasi partnership companies could be very broad in their scope and in their coverage. They could range from who's allowed to be a director, what happens to the company's profits, whether shareholders must offer their shares to other shareholders first, voting rights at shareholder meetings and so on. It's not very broad coverage of the shareholder's informal understandings that gave both the statutory provisions such a wide scope. The final point just to note about the two provisions, again, goes back to this question of the remedy that's available. Unlike both the derivative claim and the section 33 remedy, the courts can effectively use these two statutory provisions to secure what's been called a divorce between the shareholders. That is to ensure that the dissatisfied shareholder can leave the company and be bought out on generous terms, and it's that

very practical and very effective remedy, which again, makes the statutory provisions so effective in practice.